2002

State of Utah v. Richard Dale Houston : Brief of Appellee

Utah Court of Appeals

Kris C. Leonard; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Byron F. Burmester; Deputy Salt Lake District Attorney; Attorneys for Apellee.
Heather Johnson; David P.S. Mack; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20020526-CA
v.	:	
RICHARD DALE HOUSTON,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANN M. BOYDEN, PRESIDING

HEATHER JOHNSON (6934)
DAVID P.S. MACK (4370)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

Attorneys for Appellant

KRIS C. LEONARD (4902)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P O BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

BYRON F. BURMESTER (6844)
Deputy Salt Lake District Attorney

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20020526-CA
v.	:	
RICHARD DALE HOUSTON,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANN M. BOYDEN, PRESIDING

HEATHER JOHNSON (6934)
DAVID P.S. MACK (4370)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

Attorneys for Appellant

KRIS C. LEONARD (4902)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P O BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

BYRON F. BURMESTER (6844)
Deputy Salt Lake District Attorney

Attorneys for Appellee

TABLE OF CONTENTS

ADDENDA

Addendum A.	Utah Code Ann. § 76-6-302 (1999)
Addendum B.	Utah Code Ann. § 77-29-1 (1999)
Addendum C.	2002 Calendar
Addendum D.	Defendant's Notice and Request for Disposition of Charges (R. 13-15)
Addendum E.	Trial Court's Various Rulings (R. 272: 10-21) (March 11 pretrial conference) (R. 271: 5-8) (April 22 pretrial conference)
Addendum F.	Unsigned Findings of Fact and Conclusions of Law (R. 133-36)

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20020526-CA
v.	:	
RICHARD DALE HOUSTON,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999) (contained in **Addendum A**).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002), pursuant to a transfer order of the Utah Supreme court dated August 27, 2002.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The only issue this Court should reach is whether the trial court properly extended the trial date "to a reasonable time outside the disposition period to accommodate, in part, defense counsel's schedule."

The trial court's ruling on a motion to dismiss for failure to prosecute under the detainer statute is reviewed for an abuse of discretion. *See State v. Peterson*, 2002 UT App

53, ¶ 5, 42 P.3d 1258; *State v. Coleman*, 2001 UT App 281, ¶¶ 3-4, 34 P.3d 790, *cert. denied*, 42 P.3d 951 (Utah 2002). This Court reviews the underlying legal conclusions for correctness and the factual findings for clear error. *See Peterson*, 2002 UT App 53, ¶5; *Coleman*, 2001 UT App 281, ¶¶ 3-4. The attribution of delay to a party is a factual finding, reviewed for clear error. *See Coleman*, 2001 UT App 281, ¶ 4, n.4; *State v. Phathammavong*, 860 P.2d 1001, 1004 (Utah App. 1993). The determination of the existence of "good cause" under the speedy trial statute is a legal conclusion reviewed for correctness. *See State v. Heaton*, 958 P.2d 911, 915 (Utah 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The only statute relevant to the issue to be addressed on appeal is Utah Code Ann. § 77-29-1 (1999), and it is contained in **Addendum B**.

STATEMENT OF THE CASE

Because the chronology of the proceedings in this matter is critical in applying Utah's statute on speedy trial rights, Utah Code Ann. § 77-29-1 (1999), the relevant dates and corresponding undisputed facts are presented as follows[1]:

Nov. 29, 2001	An information was filed charging defendant Richard Dale Houston and Gabriel Valenzuela as co-defendants with one count of aggravated robbery (R. 3-5).
Dec. 8, 2001	Defendant signed his "Notice and Request for Disposition of Pending Charge(s)" [disposition request] (R. 13-15) (attached in **Addendum D**).

[1]A 2002 calendar is included in **Addendum C** for the reader's convenience.

Dec. 14, 2001	The prison stamps as received defendant's disposition request (*id.*). Add. D.
Dec. 20, 2001	The roll call hearing was held at which the preliminary hearing was set for January 15, 2002 (R. 16).
Jan. 15, 2002	A joint preliminary hearing was begun for both defendants, but was halted at noon (R. 28-29). Neither counsel was available to continue the hearing into the afternoon, and the prosecutor raised the fact that a disposition request had been filed (R. 255: 45). The court informed defense counsel that despite his scheduling problem, "we're going to have to push on. I mean, I'm not going to do anything that's going to jeopardize the detainer. That's not going to happen." (*Id.*). The court recessed the hearing at 12:30 p.m. after scheduling the matter to continue the next day (R. 28-29).
Jan. 16, 2002	Despite "heroic efforts," the court was unable to convince the prison to transport defendant for the remainder of the preliminary hearing on such short notice (R. 255: 46-47). After discussing the detainer problem with counsel, the judge attempted to set the matter for January 22 (R. 255: 47). Due to a conflict with the schedule of co-defendant's counsel, the matter was continued to January 24, the court's next available date (*id.*).
Jan. 24, 2002	The preliminary hearing was completed, and the court found probable cause to bind both defendants over (R. 255: 93-94). In discussing the setting of the arraignment, the prosecutor noted, "There's that issue of the detainer. I would like to keep this moving along as best we can. The earlier we can get in to see Judge Boydon [sic] the better" (R. 255:94). The arraignment was set for February 11 (R. 30).
Feb. 11, 2002	At the arraignment, the prosecutor filed a motion and supporting memorandum for a joint trial with dual juries (R. 31-39). Because both defendants had different counsel from LDA, and the co-defendant had given evidence against Houston, conflict counsel became necessary (R. 31-32). The prosecutor explained that the motion was prompted because "both defendants have filed detainers. Thus, severance is not an option because any

delay seriously jeopardizes the State's ability to try both cases." (R. 32). The prosecutor explained that he suggested the dual jury procedure because "dual juries would save the case from dismissal through [the] detainer . . . . If the cases are severed as a result of the *Bruton* problem, the State will likely be unable to prosecute both cases within the 120-day window. Thus, one or both cases may be dismissed. The dual jury procedure solves this problem." (R. 35). The minutes reflect, "on defense motion, conflict counsel to be appointed" (R. 259). The matter was continued to February 25 (R. 260-62).[2]

Feb. 25, 2002 — The trial court set the three-day jury trial for March 13 through 15—sixteen days away (R. 260-61).

Feb. 27, 2002 — The prosecutor provided written notice of its expert witnesses (R. 41-42). Br. of Aplt. at 31, n.31.

Mar. 8, 2002 — The prosecutor filed a list of proposed witnesses at trial which included experts (R. 47-49). He also filed a motion in limine seeking to have the court admit the DNA testing results involving blood from the victim and each co-defendant as well as blood found on the victim's clothing and a wall near the scene of the crime (R. 50-59).

Mar. 11, 2002 — A pretrial conference was held at which defendant objected to the State's proposed expert witnesses because the State failed to give defendant thirty days' notice as required by statute (R. 272: 5-7, 15-16). Add. B. Defendant noted that the appropriate remedy would be continuance, which would extend the matter beyond the detainer period, or exclusion of the evidence, which would permit trial in two days as scheduled (R. 272: 6). The prosecutor emphasized that the appropriate remedy was a continuance, and that the continuance should not be deducted from the detainer period (R. 272: 4). The trial judge ruled that she would not suppress or exclude the DNA evidence where the setting of the trial only sixteen days after the arraignment left the State unable to meet the thirty-day notice requirement for its

---

[2]The case against the co-defendant apparently was later reassigned to another judge, and the State's motion for a dual jury was stricken (R. 272: 15).

expert witnesses, and the prosecutor submitted the notice within two days of trial being set (R. 272: 13-14; R. 41-42) (the ruling is attached in **Addendum E**). The court left it to defendant to decide whether a continuance would be necessary to permit him to meet the expert testimony and have a fair trial (R. 272: 17-18). Defendant objected to the situation, but chose the continuance (R. 272: 18). The trial court ruled that the continuance was "technically" granted to the State due to its failure to comply with the thirty-day notice requirement, and noted that defendant did not waive his statutory speedy trial right (R. 272: 17-18). Add. E.

However, in attempting to reschedule the trial, problems arose between defense counsel's availability and the trial court's calendar (R. 272: 18-19). Add. E. The court attempted to set the date inside the detainer period, but defense counsel was unavailable (R. 272: 18-19). The judge then offered her next available date of April 24, 25, and 26, with the judge expressly noting that those days were past the disposition period (R. 272: 20-21). Add. E.

Mar. 19, 2002 — The prosecutor filed a motion and supporting memorandum, asking the court to reconsider its finding that the fourteen-day delay occasioned by defendant's need to obtain conflict counsel should have been attributed to defendant and should have tolled the detainer period (R. 84-91).[3]

---

[3]The record contains no evidence of a ruling on this motion. At the April 22 pretrial hearing, defense counsel made the following comment:

> I think I know where we are going with this [discussion of responsibility for earlier delays]. We talked about this basically the last time we were here when the State had filed a Motion to Reconsider, I guess, the reason for the continuance the second time. So we know what the likely ruling will be. . . .

(R. 272: 3). The only other evidence of a hearing after the State filed its motion on March 19 is a mention in the docket of a hearing on April 1 (R. 220). No minutes or explanation of the content of that hearing appear in the record.

Apr. 12, 2002	The final day of the original, uninterrupted 120-day detainer period as believed by the trial court and the parties (R. 271: 6; R. 272: 18). Br. of Aplt. at 16-17. Add. C.
Apr. 18, 2002	Defendant filed a motion and supporting memorandum to dismiss the charge against him, alleging a violation of his statutory speedy trial rights (R. 143-48).
Apr. 22, 2002	A pretrial conference occurred, at which the trial court heard argument on the earlier delays caused by the need for conflict counsel and the inadequate notice provided for the State's expert witnesses (R. 271: 1-8). The court then ruled that it would not attribute the delays to either party but that both delays warranted reasonable continuances under the circumstances (R. 271:7-8) (the ruling is attached in **Addendum E**). The court also denied defendant's motion to dismiss (R. 271: 8). Add. E. The prosecutor submitted at the April 22 hearing proposed findings of fact and conclusions of law which correctly reflected the trial court's verbal rulings on the various delays and the scheduling of the trial (R. 271:8-9; R. 133-36) (the document is attached in **Addendum F**). These findings were never signed (*id.*).
Apr. 24, 2002	Trial began (R. 248).
Apr. 26, 2002	Following a three-day trial, the jury found defendant guilty of aggravated robbery, but did not find that he had used a knife in the crime (R. 205-06).
July 1, 2002	Defendant was sentenced to five-years-to-life in the Utah State Prison, with the sentence to run consecutively with the time he was then serving in prison (R. 226-27).
July 9, 2002	Defendant timely submitted a notice of appeal (R. 228-29)
Aug. 27, 2002	The Utah Supreme Court transferred the case to this Court (R. 251).

STATEMENT OF FACTS

The particular facts of defendant's crimes are not relevant to determination of the issues on appeal. However, they are briefly summarized for the reader's information.

On October 23, 2001, the victim, Rafael Duran, and a friend went to Sociables, a bar in Salt Lake City (R. 256: 105-06). He carried with him his cell phone together with a sizeable amount of money in his wallet (R. 256: 107-08).

Duran's money eventually came to the attention of defendant and Gabriel Valenzuela (R. 256: 136). They decided to rob Duran (R. 256: 137). While at the bar, Duran lent his cell phone to someone, and it was passed around to several other people who made calls on it (R. 256: 12). Duran attempted to keep tabs on his phone and eventually noticed defendant walk outside with it (R. 256: 123-24, 127). When he did not return, Duran went outside to get it (R. 256: 113).

Duran never knew what hit him, and was unconscious for approximately two weeks (R. 255: 10-11). He was discovered shortly after the attack by bar patrons who called 911 (R. 257: 221-22). He had suffered two knife cuts on his back, three on his upper chest, one on his left forearm, and one on his left arm (R. 257: 210). He had also suffered a severe head injury and had undergone surgery to relieve the bleeding on his brain (R. 257: 210, 216). His wallet and cell phone were never located (R. 256: 115).

Bar patrons were instrumental in identifying a truck seen speeding from the scene, defendant, and Valenzuela, his co-defendant (R. 258: 420-22; R. 257:222-23, 238-44; R. 256: 162-65; State's Exh. 25). Police later obtained the truck, which was registered to defendant

(R. 258: 425; R. 257: 236). Defendant was found to have a large, fresh cut between his right thumb and forefinger (State's Exh. 21). The police took blood samples from several places, including the scene of the attack, the victim's clothing, the inside and outside of defendant's truck, as well as from defendant (R. 257: 251-59, 262-66, 278-83, 287-88, 293-94, 308-23). DNA testing provided a match between the scene of the crime, the victim's clothing, and defendant (R. 257: 351-52).

Defendant and Mr. Valenzuela were charged as co-defendants (R. 3-5). Mr. Valenzuela later testified against defendant (R. 133-51).

SUMMARY OF THE ARGUMENT

This Court need not reach any of defendant's three arguments because, even assuming defendant would prevail on the merits of his claims and the total amount of the delays should not toll the running of the 120-day disposition period, the final trial setting was supported by "good cause" under the speedy trial statute because it was necessary to accommodate defense counsel's schedule. Because the original trial date was set for only sixteen days after the arraignment, the prosecutor was not able to provide defendant with the statutory thirty days' notice of the expert witnesses he intended to use at trial. At the pretrial conference on March 11, the trial judge determined that a trial continuance was necessary to permit defendant the full amount of notice and, hence, a fair trial. The trial court offered to set the trial during the first week of April, which would have permitted defendant the full notice period as well as allowed the trial to occur within the original detainer period. The only reason the trial was not set for this period was because defense counsel was going to be out of town. The next

available date on the court's calendar for a felony jury trial was April 24—eleven days beyond the actual end of the original detainer period.[4] Extending the disposition period beyond the 120-day period to accommodate defense counsel's schedule constitutes "good cause" under the detainer statute. The trial court therefore properly scheduled the trial for its next available date beyond April 13 and correctly denied defendant's motion to dismiss.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS BECAUSE THE RESCHEDULING OF THE TRIAL BEYOND THE DETAINER PERIOD TO THE COURT'S NEXT AVAILABLE DATE WAS DONE TO ACCOMMODATE DEFENSE COUNSEL'S SCHEDULE, PROVIDING "GOOD CAUSE" UNDER THE DETAINER STATUTE

A. Introduction

Defendant challenges the trial court's denial of his motion to dismiss, arguing that the trial court erroneously considered "reasonableness" in determining the existence of "good cause" for delays of the detainer period, and that the court ignored its responsibility to attribute all delays to one party or the other in order to determine whether to toll the detainer

[4]Defendant claims that the original, uninterrupted detainer period ended on April 12, 2002. Br. of Aplt. at 16-17. However, properly counted according to this Court's decision in *State v. Coleman*, 2001 UT App 281, ¶ 6, n.7, the period actually would have ended on April 13. *See* Argument, section A, *infra*.

period found in Utah Code Ann. § 77-29-1 (1999), Utah's intrastate speedy trial statute.[5] This provision, which outlines defendant's statutory speedy trial right, provides:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.
>
> (2) Any warden, sheriff or custodial officer, *upon receipt of the demand* described in Subsection (1), *shall immediately cause the demand to be forwarded* by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. . . .
>
> (3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, *for good cause shown* in open court . . . may be granted any reasonable continuance.
>
> (4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is *not supported by good cause,* whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

(Emphasis added). Add. B. The purpose of section 77-29-1 is "to protect the constitutional right of prisoners to a speedy trial and to prevent those charged with enforcement of criminal

---

[5]Although defendant mentions his constitutional right to a speedy trial (Br. of Aplt. at 2-3, 34), his arguments below and on appeal pertain solely to his state statutory right. Accordingly, this Court need only address the statutory right. *See, e.g., State v. Hovater*, 914 P.2d 37, 39 n.1 (Utah 1996), *abrogated on other grounds by State v. Litherland*, 2000 UT 76, 12 P.3d 92; *State v. Webb*, 779 P.2d 1108, 1111 n.4 (Utah 1989).

statutes from holding over the head of a prisoner undisposed charges against him." *State v. Trujillo*, 656 P.2d 403, 404-05 (Utah 1982) (citing *State v. Velasquez*, 641 P.2d 115 (Utah 1982) and referencing the purpose of the predecessor speedy trial statute); *accord State v. Viles*, 702 P.2d 1175, 1176 (Utah 1985) (stating the purpose of section 77-29-1 in similar terms); *see also State v. Wilson*, 22 Utah 2d 361, 362, 453 P.2d 158, 159 (1969) (citing the purpose of the predecessor statute).

The statute outlines the responsibilities of both parties in bringing about a speedy resolution of charges. While the prosecution carries the ultimate burden of bringing the matter to trial within 120 days of the filing of a disposition request, defendant has the threshold burden of ensuring that the statute is properly invoked. *See State v. Heaton*, 958 P.2d 911, 915-16 (Utah 1998) (when a prisoner delivers a written notice pursuant to the statute, then the prosecutor has an affirmative duty to have the matter heard in 120 days, which does not start until notice is properly delivered under the statute); *State v. Petersen*, 810 P.2d 421, 424 (Utah 1991) (describing the prosecutor's burden); *State v. Wright*, 745 P.2d 447, 450-51 (Utah 1987) (the request must be appropriately sent to the right people and contain an appropriate demand in order to be effective); *Viles*, 702 P.2d at 1175 (the burden is on the prisoner to give proper notice before being entitled to have charges disposed of in the statutory period); *Wilson*, 453 P.2d at 160 (describing the prosecutor's burden). Once a defendant has properly invoked the statute to start the 120-day period running, thereby shifting the burden to the prosecution to ensure a timely trial, defendant must not unduly

delay matters or the delay may be charged against him and the 120-day period extended. *See Heaton*, 958 P.2d at 916.

"[W]hether the district court properly denied [a defendant's] motion to dismiss pursuant to the detainer [or speedy trial] statute requires a two-step inquiry." *State v. Wagenman*, 2003 UT App 146, ¶ 8, 473 Utah Adv. Rep. 57 (quotation and emphasis omitted, alterations in original). "First, we must determine when the 120 day period commenced and when it expired. Second, if the trial was held beyond the 120 day period, we must then determine whether 'good cause' excused the delay." *Id.* (quoting *State v. Lindsay*, 2000 UT App 379, ¶ 9, 18 P.3d 504 (additional citation omitted)). If no good cause excused the delay, then the "court shall order the matter dismissed with prejudice." *Wagenman*, 2002 UT App 146, ¶ 9 (quoting Utah Code Ann. 77-29-1(4)); *see also Heaton*, 958 P.2d at 916-17 (noting that good cause excuses non-compliance with the statute).

In this case, the parties and the trial court relied on the prison's receipt of the disposition request on December 14, 2001, as the start of the 120-day detainer period (R. 271: 6; R. 272: 18). Defendant accepts this point on appeal. Br. of Aplt. at 16-17. However, this Court has determined that the 120-day period commences the day following the date stamped on the disposition request as the date the prison received the notice. *See State v. Coleman*, 2001 UT App 281, ¶ 6 n.7, 34 P.3d 790, *cert. denied*, 42 P.3d 951 (Utah 2002). Accordingly, the first day of the detainer period would be December *15*, 2001, and the last day of the uninterrupted 120-day detainer period in this case would be April 13, 2002, not April 12. *See* Add. C. The trial was scheduled to begin on April 24—*eleven* days beyond

the end of the original, uninterrupted 120-day period. Hence, the question is whether "good cause" existed to extend the 120 days beyond April 13. *See Wagenman*, 2003 UT App 146, ¶ 8.

"Good cause" means: "(1) delay caused by the defendant—such as asking for a continuance; or (2) 'a relatively short delay caused by unforseen problems arising immediately prior to trial.'" *Coleman*, 2001 UT App 281, ¶ 6 (quoting *Petersen*, 810 P.2d at 426 (footnote omitted)); *see also Heaton*, 958 P.2d at 916 ("when a prisoner himself acts to delay the trial, he indicates his willingness to temporarily waive his right to a speedy trial"); *State v. Banner*, 717 P.2d 1325, 1329-30 (Utah 1986) (defendant's delay of a trial constitutes a temporary waiver of his statutory right to a speedy trial); *Velasquez*, 641 P.2d at 116 (same under predecessor statute); *accord State v. Phathammavong*, 860 P.2d 1001, 1004-05 (Utah App. 1993).

B. The Relevant Record

The rescheduling of the trial beyond the detainer period occurred at the pretrial conference on March 11, 2002. The prosecutor raised the issue of his late notice of expert witnesses, explained why he was unable to provide a full thirty days' notice, and acknowledged that defendant would be entitled to seek a continuance for the remainder of the thirty-day period in order to meet the expert testimony (R. 272: 4-5).[6] Defendant wanted

[6]The prosecutor assured the trial court that the reports of the DNA expert and the serologist were "handed to defense counsel at the prelim[inary hearing]" and that the medical records were sent as part of the "initial discovery" (R. 272: 9-10). It was only the curriculum vitae and the notice that were sent on February 27, completing the information

to proceed with the March 13 trial, but only upon exclusion of the State's expert testimony (R. 272: 8). The trial judge then explained her understanding of the issue before her:

> All right. This is clearly something that does require some balancing on the Court's part because we have almost what would appear to be conflicting rights—not conflicting, but rights that the defendant does enjoy that the Court is going to do everything I can to make sure that you have the timely trial on this matter, but at the same time it needs to be a fair and just trial. And if your counsel cannot go forward on this week's setting because they do not have the information that they need, then it may very well be that the interests of justice dictate that, in order for you, Mr. Houston, to have a fair trial, that it needs to be delayed.
>
> That then raises the issue that you have made, the detainer. But the detainer is not so absolute that the Court cannot take into consideration all of those issues and all of these balancing issues.
>
> While the defendant has not requested continuances, the fact is, there needs to be a delay because there was a conflict in the Legal Defender's office with counsel and there needed to be an appointment of counsel and that caused a delay. In fact, those are the delays that have been involved in this court before me, because it was not bound over to me until after the January 24th preliminary hearing bindover. It was immediately set on my calendar in a timely fashion for the arraignment; and then that was continued. So we do have continuances here.
>
> It's not particularly important that I call them either defense or State's except that we do have the 120-day disposition request. And so I need to make sure that I am not granting more time than is appropriate because the defendant has not requested it, and I, in fact, did set the jury trial on March 13th, 14th and 15th.
>
> Those dates are still available. The Court is still scheduled to do that. Apparently the State is still ready to go forward but has not given the defendant the 30-day notice required by law on the expert witness[es].

---

required by statute to be given to defendant (R. 272: 10). None of the experts testified at the preliminary hearing. *See* Utah Code Ann. § 77-17-13(5) (1999).

> That I now need to take into consideration. More than just saying, Do you wish your notice or not, if it's something that Mr. Houston feels he cannot be prepared to go to trial on March 13th, 14th and 15th because he has not received the substance of those reports and cannot prepare adequately for cross examination—and again, I am not characterizing this one way or another as a defense request or a State request—I need to be able to weigh the interests of justice here and determine whether or not I am denying Mr. Houston a right to a fair trial by requiring him to go forward this week if the defense doesn't feel that they have had adequate time to prepare for cross examination of expert witnesses. That's the only question. I'm not saying that it will then be counted as your continuance request.

(R. 272: 10-12). Add. E.

Defendant objected to the court's characterization of the situation and continued to seek exclusion of the expert testimony because of the lack of adequate notice (R. 272: 12-13). Add. E. The court responded:

> All right. Then I will rule on that issue then, that I am not going to suppress the DNA results simply because the notice has not been met. The requirements that the State provide that notice are in place. But the fact that it was bound over on January 24th at a preliminary hearing, there was no jury trial date set, and I do not feel that it warrants suppression of the evidence because they did not provide that notice at the bindover date.
>
> The arraignment date on February 11th was continued to February 25th. And the February 25th date was when it was scheduled for jury trial, and that is the date that I'm going for.[7] So I am not going to suppress the evidence itself because the 30-day notice requirement was not given from the January 24th hearing. . . . To exclude it. . . . And that is a more accurate characterization. So I am denying the motion to exclude.

(R. 272: 13-14). Add. E. The trial court also included the remaining expert testimony at issue in its ruling (R. 272: 14). Add. E.

---

[7]Defendant agrees that the official notice of expert witnesses was filed two days after the trial date was set—on February 27 (R. 41-42; R. 272: 5-6). Br. of Aplt. at 35-38.

Defendant declared that he could not proceed to trial as scheduled without the statutory notice (R. 272: 16). Add. E. He refused to request a continuance, but agreed that the trial must be rescheduled (*id.*). Add. E. The trial judge then explained her position:

> And I just want to clarify my ruling a little bit.
>
> It is true that I have ruled that I will not exclude the testimony or the expert witnesses based on the noncompliance with the 30 days because I just simply did not find the bad faith necessary in the failure to comply with the 30-day notice. The State has done it as quickly as they can in the trial setting. And so by not excluding the testimony, or excluding the witnesses I guess, by default, I guess that means I am granting the continuance and it is to the requesting party.
>
> What I asked the defendant then was, based on the fact that there is currently before me a 120-day disposition, I needed to have the input as to whether or not the defendant felt he could be prepared to go forward so that, even though the remedy I have provided and the remedy that is provided by statute is a continuance for the proponent party, I wanted the input as to whether or not the defendant felt that he could have a fair trial and be adequately prepared. That is the answer that Mr. Mack [defense counsel] has given me today after consulting with both his client, Mr. Houston, and with the office. And they do not feel that they can be fairly prepared for the series of charges without having more time to examine the testimony which I have not excluded.
>
> The continuance, therefore, I guess, technically, is being granted to the State because they have not provided, technically, the 30-day notice and they do need to do that. But the issue before me, which was more important to me, is just the granting of a fair and timely trial for Mr. Houston.[8]
>
> The 120-day disposition date, my understanding, after reviewing the calendar with both Mr. Mack and Mr. Burmester [the prosecutor], is April 12th.

---

[8]At a later hearing, the trial court noted and rejected defendant's argument—set forth on appeal—that the prosecutor should have complied with the notice requirement as early as the preliminary hearing, even though the case had not been bound over, the parties had not appeared before this judge, and a trial date had not been set (R. 271: 7).

> We can do what flexibility we need to set that during that time frame [sic]. The defendant is not waiving that 120-day request.
>
> Again, I know that there are other issues that I need to balance that against. And I will set it as quickly as we can, but we are to the March 11th date. That puts it within a month. I do have several other jurys that are set, many of them in custody, and I'll throw out some dates and see what we can [do]. Whether or not that can be before April 12th is another issue.

(R. 272: 17-18). Add. E.

During the discussion of potential trial dates which followed the judge's explanation, the trial judge determined that the last day of the required thirty-day notice period was the end of March (R. 272: 20). Add. E. The judge offered to free the court's calendar to set the felony jury trial the first week of April, within the original, uninterrupted detainer period (R. 272: 18-19). Defense counsel stated that he could not do it that week because he was to be out of town for all but one day of that week (R. 272: 18-19). Add. E. The parties discussed the next available date of April 24, and the judge explained:

> All right. Let's set this for April 24, 25 and 26. And the record will reflect that that is past the 120-day disposition. The Court knows that as we are doing it and it's past the 30 days for the expert-witness notice. But it is the soonest I can set it on the calendar, given that the defense counsel is not going to be here the first week of April and the [weeks of the] 8th and 15th are master calendars for the Court. And I don't have the flexibility of setting during those weeks, so I am setting them the next available date that I have for a felony jury [trial].

(R. 272: 20-21). Add. E.

C. Defense Counsel's Scheduling Conflict Provides "Good Cause" For Rescheduling The Trial Beyond The Detainer Period

Defendant claims three periods of delay, arguing that they should not toll the detainer period: 1) the prison's refusal to transport defendant to court for the second day of what was anticipated to be a one-day preliminary hearing, which resulted in a seven-day delay in completing the hearing[9]; 2) the State's motion for a joint trial with dual juries, which allegedly prompted a fourteen-day delay to obtain conflict counsel for one defendant[10]; and 3) the prosecutor's inadequate notice of expert witnesses, which allegedly prompted a forty-two day delay in the trial setting. Br. of Aplt. at 18-41. The trial court did not address the prison's delay, but determined that the need for conflict counsel and the need to provide a full thirty days' notice of the expert witnesses required reasonable continuances under the detainer statute (R. 271: 5; R. 272: 5-7).

Rather than reviewing all of defendant's claims and the trial court's multiple rulings thereon, this Court need only address the question of whether the setting of the trial date

---

[9]The trial court did not toll the period for this first period, even though the need for a second day to complete the preliminary hearing was caused, in part, by the schedule of one of the defense counsel, thereby providing "good cause" for rescheduling the hearing. *Cf., Heaton*, 958 P.2d at 917.

[10]Defendant fails to recognize that once the co-defendant decided to testify against defendant, conflict counsel would need to be appointed anyway. Counsel for the co-defendant recognized as much because, at the conclusion of the preliminary hearing, he informed the prosecutor that he needed to conflict out of the case (R. 271: 3-4). The prosecutor filed its motion thereafter only because the change of attorneys had not occurred, and he did not want further delay to cause dismissal of the case against either defendant, both of whom had filed disposition requests (R. 35; R. 271: 4).

beyond the detainer period to accommodate defense counsel's schedule constitutes "good cause" under the detainer statute. The record clearly shows that the trial would have been set within the original uninterrupted 120-day period but for defense counsel's unavailability.[11] The three-day trial was set for the next available setting on the trial court's calendar for a felony jury trial, extending it beyond the end of the original detainer period. *See Heaton*, 958 P.2d at 916 (Utah 1998) ("this court may affirm a trial court's decision on any reasonable legal basis, provided that any rationale for affirmance finds support in the record."); *Coleman*, 2001 UT App 281, ¶ 14, n.9.

"[E]xtending the trial date to a reasonable time outside the disposition period to accommodate, in part, defense counsel's schedule constitutes 'good cause' under section 77-29-1(3) and (4)[.]" *Heaton*, 958 P.2d at 917; *see also State v. Bonny*, 477 P.2d 147, 148 (Utah

---

[11]The prosecutor raised the issue below in his Motion to Reconsider Finding[s], filed March 19, 2002 (R. 89-90). Findings and conclusions on this point were included in the unsigned Findings of Fact and Conclusions of Law (R. 133-36). Add. F. The record undeniably reflects the facts relevant to defense counsel's schedule as stated herein, even though the only mention made by the trial court of the scheduling problem was brief:

> . . . The resetting [of the trial] was done as quickly as we could.
>
> A number of days were discussed and this was the first day that we could get all parties here, so the April 24th date, which is scheduled this week and which is apparently going forward, is a reasonable date as the court calendar and every other circumstance could be taken into consideration, if I find that it was not unreasonable to delay it because of the expert witness issue and the conflict of counsel issue. I find both of those reasons good [cause] for delay, so I am denying Mr. Houston's Motion to Dismiss because it was not held within the 120 days.

(R. 271: 8). Add. E.

1970) (setting the trial outside the statutory period to accommodate defense counsel's schedule was "entirely reasonable and practical").

The Utah Supreme Court's ruling in *Heaton* is dispositive of defendant's appeal. In *Heaton*, the Utah Supreme Court addressed the propriety of a trial setting outside the detainer period because of a conflict with defense counsel's schedule. *Id.* at 917. The date initially offered by the trial court in that case was within the disposition period, but both the prosecutor and defense counsel were involved in another criminal trial on that date, requiring that the trial be set at the next available date, one month beyond the disposition period. *Id.* The supreme court determined that the second setting "was not unreasonable" in light of the situation, and expressly held that, while there may have been error in some of the trial court's legal conclusions, "extending the trial date to a reasonable time outside the disposition period to accommodate, *in part*, defense counsel's schedule constitutes 'good cause' under section 77-29-1(3) and (4), and the trial court correctly denied Heaton's motion to dismiss." *Id.* (emphasis added). In other words, the fact that the prosecutor bore partial responsibility for setting the trial date outside the disposition period did not prevent the four-week delay in the trial setting from being "reasonable" under the detainer statute.

Defendant addresses the scheduling conflict at two points in his brief, acknowledging the basic record facts, apportioning responsibility for the delay to the court and the prosecutor, and arguing, without mention of legal authority, that he should bear no responsibility for the delay beyond the disposition period because his schedule became relevant only because of the State's failure to give full notice of its expert witnesses. Br. of

Aplt. at 31 n.31, 40-41. Although the expert witness notice was the reason for having to *reschedule* the trial, it was *not* the reason for scheduling the trial outside of the 120-day detainer period. The trial could have been set *within* the original, uninterrupted detainer period *but for* defense counsel's schedule. The court calendar permitted it, nothing suggests that the prosecutor was unavailable, and the sole reason the matter was not timely set the first week of April was because defense counsel was unavailable. Accordingly, the rescheduling of the trial date outside the original disposition period to the next available date because of defense counsel's schedule constitutes "good cause" under the detainer statute, and the trial court properly denied defendant's motion to dismiss. *See Heaton*, 958 P.2d at 917.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to dismiss.

RESPECTFULLY SUBMITTED this 29th day of July, 2003.

MARK SHURTLEFF
Attorney General

KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was hand-delivered to Heather Johnson and David P.S. Mack, Salt Lake Legal Defender Assoc., attorneys for defendant/appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 9th day of July, 2003.

ADDENDA

Addendum A

UTAH CODE ANNOTATED

1953

VOLUME 8B

1999 REPLACEMENT

Titles 76 and 77

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

History: C. 1953, 76-6-302, enacted by L. 1973, ch. 196, § 76-6-302; 1975, ch. 51, § 1; 1989, ch. 170, § 7; 1994, ch. 271, § 1.

Addendum B

UTAH CODE ANNOTATED

1953

VOLUME 8B

1999 REPLACEMENT

Titles 76 and 77

77-29-1. Prisoner's demand for disposition of pending charge — Duties of custodial officer — Continuance may be granted — Dismissal of charge for failure to bring to trial.

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

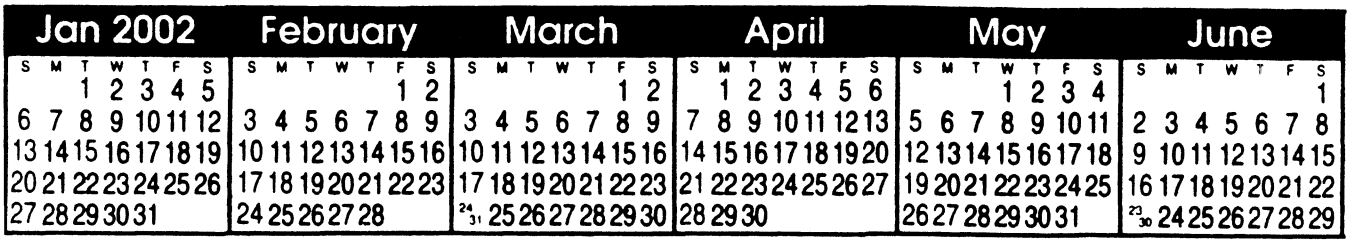
(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

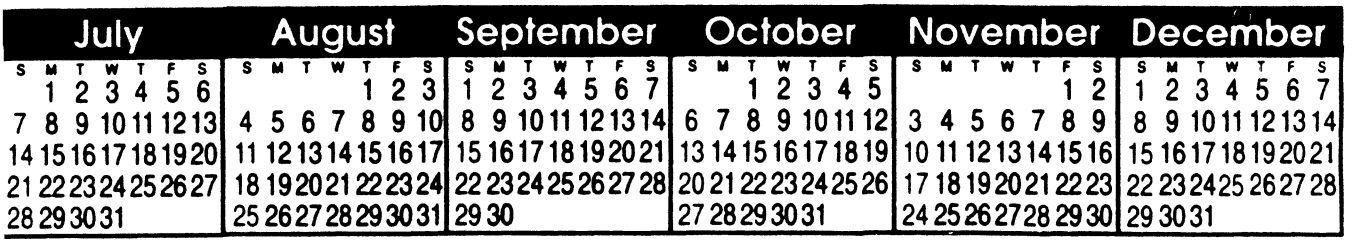
(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

History: C. 1953, 77-29-1, enacted by L. 1960, ch. 15, § 2.

Addendum C


Jan 2002
S M T W T F S
1 2 3 4 5
6 7 8 9 10 11 12
13 14 15 16 17 18 19
20 21 22 23 24 25 26
27 28 29 30 31
February
S M T W T F S
1 2
3 4 5 6 7 8 9
10 11 12 13 14 15 16
17 18 19 20 21 22 23
24 25 26 27 28
March
S M T W T F S
1 2
3 4 5 6 7 8 9
10 11 12 13 14 15 16
17 18 19 20 21 22 23
24 31 25 26 27 28 29 30
April
S M T W T F S
1 2 3 4 5 6
7 8 9 10 11 12 13
14 15 16 17 18 19 20
21 22 23 24 25 26 27
28 29 30
May
S M T W T F S
1 2 3 4
5 6 7 8 9 10 11
12 13 14 15 16 17 18
19 20 21 22 23 24 25
26 27 28 29 30 31
June
S M T W T F S
1
2 3 4 5 6 7 8
9 10 11 12 13 14 15
16 17 18 19 20 21 22
23 30 24 25 26 27 28 29


July
S M T W T F S
1 2 3 4 5 6
7 8 9 10 11 12 13
14 15 16 17 18 19 20
21 22 23 24 25 26 27
28 29 30 31
August
S M T W T F S
1 2 3
4 5 6 7 8 9 10
11 12 13 14 15 16 17
18 19 20 21 22 23 24
25 26 27 28 29 30 31
September
S M T W T F S
1 2 3 4 5 6 7
8 9 10 11 12 13 14
15 16 17 18 19 20 21
22 23 24 25 26 27 28
29 30
October
S M T W T F S
1 2 3 4 5
6 7 8 9 10 11 12
13 14 15 16 17 18 19
20 21 22 23 24 25 26
27 28 29 30 31
November
S M T W T F S
1 2
3 4 5 6 7 8 9
10 11 12 13 14 15 16
17 18 19 20 21 22 23
24 25 26 27 28 29 30
December
S M T W T F S
1 2 3 4 5 6 7
8 9 10 11 12 13 14
15 16 17 18 19 20 21
22 23 24 25 26 27 28
29 30 31

Addendum D

THE DEPARTMENT OF CORRECTIONS

RTC
12/20/01

NOTICE AND REQUEST FOR DISPOSITION OF PENDING CHARGE(S)

TO: DIRECTOR, DIVISION OF INSTITUTIONAL OPERATIONS

Notice is hereby given that I, Richard Houston (Inmate Name) do hereby request final disposition. Charge(s) of Aggravated Robbery are now pending against me in the Salt Lake City 3rd district Court, brought by Salt Lake county (prosecuting agency e.g., county, city, Attorney General, etc. in the State of Utah) and request is hereby made that you forward this notice to the appropriate authorities together with such information as required by law.

Dated this 5 day of Dec/01 (Month / Year).

Inmate's Name Richard Houston USP# Z8987

****

I hereby certify that I have received a copy of the foregoing notice this 7 day of Dec 01 (Month / Year).

Authorized Agent, DIO Record Unit
USP, PO Box 250, Draper, Utah 84020
CUCF, PO Box 898, Gunnison, Utah 84634

(Revised 10/2000)
(TMF 05/05.06,C)

State of Utah
DEPARTMENT OF CORRECTIONS
DIVISION OF INSTITUTIONAL OPERATIONS

hael O. Leavitt
Governor
Mike Chabries
Executive Director
Scott V. Carver
Division Director

PO Box 250
Draper UT 84020
(801) 576-7000

14 December 2001

Salt Lake City Prosecuting Attorney
2001 S State #S3400
SLC, UT 84109-1200

RE: HOUSTON, Richard Dale
U.S.P.# 28987 DOB 11/08/79
YOUR CASE # 011918410

Dear Sirs:

MR/MRS/MS Richard Dale Houston is currently incarcerated in the Utah State Prison. He/She is requesting disposition of untried charges of Aggravated Robbery, pending in your jurisdiction. Enclosed is the appropriate paperwork to process his request.

Thank you for your assistance with this matter.

Sincerely,
Mr. Scott Carver, Director
of Institutional Operations

Alberta Smith

by: Alberta Smith
Records/Office Tech III

Encl. (2)
cc: Third District Court Clerk
Inmate File

UTAH DEPARTMENT OF CORRECTIONS

CERTIFICATE OF INMATE STATUS

120-DAY DISPOSITION

TO: Third District Court Clerk

RE: HOUSTON, Richard Dale 28987
Inmate Name USP#

TERM of COMMITMENT: Theft by Receiving Stolen Property 1-15 yrs. Discharge Firearm from Vehicle/Highway 0-5 yrs, Poss/Purchase Dangerous Weapon-Restricted 0-5 yrs.

TIME SERVED: Approx 02 year(s) 03mo
TIME REMAINING: Approx. 12 year(s) 09 mo
time calculated may not include toll time/credit time served*

PAROLE ELIGIBILITY:scheduled for parole 00/00/00

BOARD OF PARDONS DECISION: Hearing set for 00/00/00

Mr. Scott Carver, Director
Institutional Operations

Authorized Agent, DIO Record Unit
Utah State Prison
P. O. Box 250, Draper, UT 84020

cc: file

Addendum E

0-1-0-8 ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. RICHARD DALE HOUSTON, Defendant.	Case No. 011918410 Transcript of: PRETRIAL CONFERENCE

BEFORE THE HONORABLE ANN BOYDEN

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

MARCH 11, 2002

REPORTED BY: SUZANNE WARNICK, RDR, CSR
238-7529

counsel at the prelim, at least by the second day of the prelim.

The way it worked, we had the initial day, the 22nd, and we tried to continue it to the next day because of the detainer because we couldn't quite finish it in time. And the prison couldn't transport on a one-day notice, so we showed up in court and that's when I handed those reports, because I received the DNA report the afternoon of the 22nd. So those reports were handed to him.

I thought that the physician's -- the medical records were part of initial discovery. If defense counsel doesn't have them somewhere -- he should have had them. We've had them all along and they should have received them.

The CV and the notice were generated the week trial was set in this court. It wasn't the next day but it seems like it was by the end of that week that we got them out. If that was last week -- I can't remember.

MR. MACK: The week of the 25th.

THE COURT: Which was the 25th when that was dated.

All right. This is clearly something that does require some balancing on the Court's part because we have almost what would appear to be conflicting rights -- not conflicting, but rights that the defendant does enjoy that the Court is going to do everything I can to make sure that you have the timely trial on this matter, but at the same time it

needs to be a fair and just trial. And if your counsel cannot go forward on this week's setting because they do not have the information that they need, then it may very well be that the interests of justice dictate that, in order for you, Mr. Houston, to have a fair trial, that it needs to be delayed.

That then raises the issue that you have made, the detainer. But the detainer is not so absolute that the Court cannot take into consideration all of those issues and all of these balancing issues.

While the defendant has not requested continuances, the fact is, there needs to be a delay because there was a conflict in the Legal Defender's office with counsel and there needed to be an appointment of counsel and that caused a delay. In fact, those are the delays that have been involved in this court before me, because it was not bound over to me until after the January 24th preliminary hearing bindover. It was immediately set on my calendar in a timely fashion for the arraignment; and then that was continued. So we do have continuances here.

It's not particularly important that I call them either defense or State's except that we do have the 120-day disposition request. And so I need to make sure that I am not granting more time than is appropriate because the defendant has not requested it, and I, in fact, did set the jury trial

on March 13th, 14th and 15th.

Those dates are still available. The Court is still scheduled to do that. Apparently the State is still ready to go forward but has not given the defendant the 30-day notice required by law on the expert witness.

That I now need to take into consideration. More than just saying, Do you wish your notice or not, if it's something that Mr. Houston feels he cannot be prepared to go to trial on March 13th, 14th and 15th because he has not received the substance of those reports and cannot prepare adequately for cross examination -- and again, I am not characterizing this one way or another as a defense request or a State request -- I need to be able to weigh the interests of justice here and determine whether or not I am denying Mr. Houston a right to a fair trial by requiring him to go forward this week if the defense doesn't feel that they have had adequate time to prepare for cross examination of expert witnesses. That's the only question. I'm not saying that it will then be counted as your continuance request.

MR. MACK: But, Judge, I don't think that frames it. We don't agree with the framing on that. We are ready to go to trial on Wednesday. But we don't believe the State should be allowed, since they failed to comply with the notice requirement, to use expert witnesses.

So we need to know, first, the Court's inclination

on whether the State can use those people or not, given their failure to comply. It's not that we're not ready to go to trial. We want this date. That's the question. And he's not willing to waive the failure to comply with the notice requirement.

THE COURT: With as many motions as I do have from the State, I do not have before me even a motion to suppress the expert evidence because the notice requirement has not been complied with. That's really what we have been addressing today, but I don't have that motion as well. We'll leave these up and have those be motions in limine I guess is what we have.

MR. MACK: I think it's a response to the State's motion to admit these DNA testing results, Judge. That's not all that that motion is about.

THE COURT: So are you objecting to the admission of the DNA testing results because you did not get the notice or for other reasons as well?

MR. MACK: I think, first of all, because it's improperly noticed.

THE COURT: All right. Then I will rule on that issue then, that I am not going to suppress the DNA results simply because the notice has not been met. The requirements that the State provide that notice are in place. But the fact that it was bound over on January 24th at a preliminary

hearing, there was no jury trial date set, and I do not feel that it warrants suppression of the evidence because they did not provide that notice at the bindover date.

The arraignment date on February 11th was continued to February 25th. And the February 25th date was when it was scheduled for jury trial, and that is the date that I'm going for. So I am not going to suppress the evidence itself because the 30-day notice requirement was not given from the January 24th hearing.

MR. MACK: Maybe I misspoke on my request, Judge. I think it would be a request to exclude it, not to suppress it.

THE COURT: To exclude it. Oh, all right. And that is a more accurate characterization. So I am denying the motion to exclude.

MR. MACK: Can we read into that that you would also not exclude the doctor's statement, Swen Swensen, and the serologist Gabriel Bier's testimony for the same reason?

THE COURT: Not based on a lack-of-notice requirement.

MR. MACK: Could we just have a short recess, Judge? I would like to consult with my office about whether we want to still keep this date this week or if it's in Mr. Houston's interest to have it rescheduled.

THE COURT: Certainly. That is appropriate at this time. And we will recess on this case and handle some of the

other matters on my calendar this morning and we'll address the Houston matter later.

MR. BURMESTER: Your Honor, may I be excused to go to a different court for a moment and handle a different case?

THE COURT: You may. We'll need both attorneys obviously and Mr. Houston later on in the morning.

(Off the record.)

THE COURT: Are we in a position to deal with the Houston matters?

MR. MACK: We are, Judge.

THE COURT: Let's bring Mr. Houston out then.

Mr. Burmester, you are the last one on my list today.

Also, for the record, I am striking the motion for a dual jury since that's out now.

(The defendant is brought into the courtroom.)

THE COURT: Mr. Houston is back in the courtroom with Mr. Mack.

What else do we need to address?

MR. MACK: Well, Judge, when we were last on the record, we were talking about how to proceed with this case. This trial is set for Wednesday of this week. Our objection was that the State's failure to comply with the expert notice requirement mandates -- well, our request was that the

witnesses be excluded.

The Court's ruling was that, not for reasons of the State's -- well, let me restate that. The Court's ruling, if I understand it, was that you were not going to exclude that evidence based on their failure to comply with the notice requirement. That then bought us to the discussion of whether we could go ahead on Wednesday with the trial.

We can't. We're not prepared to confront those witnesses. But we would like to state again for the record that we feel that the remedies available to the Court are either exclusion or a continuance. The Court has indicated neither of those options but that the State can proceed with those witnesses on the date that's scheduled this week.

I consulted with my office about the ramifications of that, whether that would hurt any appeal rights of Mr. Houston if I were to proceed not being prepared. And it was the determination that it may be considered to be inviting error. For those reasons, I guess we can't go forward on Wednesday.

But I don't think that we should be in the position of having to ask for a continuance, although that seems to be where we have been placed. And we think that that's violative of Mr. Houston's due process rights. It violates the statute on expert notice. And I guess we need to then reschedule this trial.

THE COURT: And I just want to clarify my ruling a little bit.

It is true that I have ruled that I will not exclude the testimony or the expert witnesses based on the noncompliance with the 30 days because I just simply did not find the bad faith necessary in the failure to comply with the 30-day notice. The State has done it as quickly as they can in the trial setting. And so by not excluding the testimony, or excluding the witnesses I guess, by default, I guess that means I am granting the continuance and it is to the requesting party.

What I asked the defendant then was, based on the fact that there is currently before me a 120-day disposition, I needed to have the input as to whether or not the defendant felt he could be prepared to go forward so that, even though the remedy I have provided and the remedy that is provided by statute is a continuance for the proponent party, I wanted the input as to whether or not the defendant felt that he could have a fair trial and be adequately prepared. That is the answer that Mr. Mack has given me today after consulting with both his client, Mr. Houston, and with the office. And they do not feel that they can be fairly prepared for the series of charges without having more time to examine the testimony which I have not excluded.

The continuance, therefore, I guess, technically, is

being granted to the State because they have not provided, technically, the 30-day notice and they do need to do that. But the issue before me, which was more important to me, is just the granting of a fair and timely trial for Mr. Houston.

The 120-day disposition date, my understanding, after reviewing the calendar with both Mr. Mack and Mr. Burmester, is April 12th. We can do what flexibility we need to set that during that time frame. The defendant is not waiving that 120-day request.

Again, I know that there are other issues that I need to balance that against. And I will set it as quickly as we can, but we are to the March 11th date. That puts it within a month. I do have several other jurys that are set, many of them in custody, and I'll throw out some dates and see what we can. Whether or not that can be before April 12th is another issue.

We have three days requested for this trial?

MR. BURMESTER: I think that would be best, to have three days.

THE COURT: Have we received any word on whether the 27th, 28th and 29th --

(Discussion off the record.)

MR. MACK: You know, I should let you know that I am out of town the week of the 25th and the first week of April.

THE COURT: And the week of the 25th is a week that I

had another murder trial scheduled. We filled it up with other things, in fact, with another jury. If that date is not available to Mr. Mack, then --

COURT CLERK: That one is not in custody.

THE COURT: So we could do it. But you're out of town that week and April 1st as well?

MR. MACK: I'm actually in town on the 1st. But the rest of that time, the 25th through the 5th, I am out of town.

THE COURT: The week of the 8th I am on master arraignment calendar so that is the one week that is totally unavailable to me. And the 15th is the master pretrial calendar, so I don't have any options on that. That means then that -- so I suppose we could look to next week but I have misdemeanor juries set.

MR. BURMESTER: I don't know if that still gives them 30 days.

THE COURT: Yeah. All right.

MR. BURMESTER: I'm not sure what that does.

THE COURT: You gave the notice on what date, on the 25th?

MR. BURMESTER: Your Honor, I'm sorry, I didn't bring my file over. There's three separate documents. And the precise date they went out, I'm not sure. But I know it was the week of the date that we actually set a trial date.

THE COURT: And that, I believe, was on February

25th. Let me check on the docket.

We scheduled the March 13th date on February 25th. And that is simply not even 30 days outside. The trial date was set closer than the 30 days from the date that this was first set for trial. And that's the basis of my ruling, not for excluding.

If we go to the 27th of March, that is 30 days from the 25th. And it wouldn't have been any earlier and it may have been a day or two later. So we are going to be to the week of April 1 before the 30-day notice has run.

Do you want to set it on April 24th, 25th and 26th, which is actually a felony week? And we may have some in-custody but it won't have the additional issue of the disposition.

Who have I got on the 24th, 25th and 26th of April?

(Discussion off the record.)

THE COURT: All right. Let's set this for April 24, 25 and 26. And the record will reflect that that is past the 120-day disposition. The Court knows that as we are doing it and it's past the 30 days for the expert-witness notice. But it is the soonest I can set it on the calendar, given that the defense counsel is not going to be here the first week of April and the 8th and 15th are master calendars for the Court. And I don't have the flexibility of setting during those weeks, so I am setting them the next available date that I

have for a felony jury.

MR. MACK: Should we set one more pretrial?

THE COURT: Yes.

MR. BURMESTER: Sure.

THE COURT: Yes, and also deal -- do we still need to further deal with the State's motion in limine as to the admissibility of DNA testimony substantively, or was your only objection to the notice?

MR. MACK: Well, why don't you give me a cut-off time to file an objection to that, Judge.

THE COURT: It is a motion in limine and so you would not necessarily need to do that, but I think it is appropriate. We can just set a time and the State can respond on that.

MR. BURMESTER: Your Honor, if I may follow up. I cited to -- I think it was in Judge McCleve's court.

THE COURT: *Butterfield?*

MR. BURMESTER: Yes, in *Butterfield*. That case has since been appealed and had an opinion rendered. And I will provide the Court that opinion, which my understanding, in essence, it uphold's Judge McCleve's ruling.

THE COURT: When did that ruling come down, last summer? It was before you made the motion in limine.

MR. BURMESTER: Yes. I tried to get it in as quick as I could but I didn't have time to alter the memo.

Addendum F

IN THE THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. RICHARD DALE HOUSTON Defendant.	Transcript of: Motions Hearing Case No. 011918410FS

BEFORE THE HONORABLE ANN BOYDEN

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

MONDAY, APRIL 22, 2002

DOROTHY T. SNARR, CSR, RPR
Caribou County Courthouse
159 South Main #106
Soda Springs, Idaho 83276
(208) 547-4342 Ext. 141

The second thing is Gabriel Behr, serology, it is the State's point that it went out with the initial discovery, but certainly was completed by January 16th.

THE COURT: Was that before the prelim?

MR. BURMESTER: That is mid-way. It is mid-way through the prelim. Again on January 15th, it was a half day. We couldn't continue on the 16th, so we it was continued until the 24th when it was completed.

Todd Rigley's report, he is the DNA expert and the State received his report on the evening of January 15th, after the first day of the preliminary hearing. And the prosecutor handed both defense counsel copies of his report on the morning of the 16 and that report was submitted as evidence at the preliminary hearing on January 24th. Again, the State is not saying that that is sufficient to comply with the statute. It is not, but I think it does affect whether this Court believes there has been bad faith and therefore good cause or not good cause.

THE COURT: Any further response on that, on this motion?

MR. MACK: Well, very briefly, Judge. So if I am hearing right and getting the dates right, by January 16th, it sounds like the State is saying that they have possession of it and have shared all expert reports by that date. So they well have complied with part of the statute well in advance of the trial being set, but it needs to be fully complied with, within 30 days of the trial being set. And it seems like the rest of it could have been done as well: the CV's or any other additional information they need to provide to comply with the statute.

I think other than that, Judge, we will submit it.

THE COURT: All right. Thank you. Again, I would like to make sure that the record is clear and as much as the record, the parties are clear in that

this is an issue that may resolve an important issue. And certainly Mr. Houston had made the request to basically have pending cases resolved within the 120-day time period that is allowed for in-state circumstances like this one is. And he, in fact, Mr. Burmester, I believe, has been approaching all of these trial settings with that in mind. That Mr. Houston made that request early, and it is something that I need to look at seriously. But at the same time, I need to weigh everything and decide what is reasonable and what is not reasonable. And in fact that is why the findings that I need to make are not just whether or not it was one party or the other who made a mistake, or one party or the other who didn't comply. I need to be able to look at all of the circumstances and see whether or not the delay is reasonable.

The delay in this case is from the April 12th date then. I don't believe there is any contesting on that, that the April 12th date would have been the first one that I need to determine. Correct? April 12th is the 120-day detainer?

MR. MACK: Correct.

THE COURT: And so the question is whether setting this trial then past that date, and with it being set on the 24th, it is 12 days then past the April 12th date, was reasonable or whether there was reasonable cause for doing that.

One of the delays certainly has to be that it was continued back in February when it was first prelimmed and bound over to me and I first got the case in early February, that there was a delay at the arraignment because there needed to be conflict counsel. And again, I don't know that it is necessary that I actually attribute to one side or the other what the delay was, but it is clear that with the two defendants still pending trial that there needed to be a conflict counsel. And that certainly does not unreasonably delay the case.

The expert discovery issue is a little bit more problematic just in that there are some very specific statutory requirements that the State needs to make in order to meet their discovery requirements. They are required to bring in an expert witness. And again, Mr. Burmester apparently has met those requirements as far as giving the explanation and even attempted to give all of the information as quickly as this matter was set, but the matter was not set out 30 days. The first trial date was within 20 days, so we technically could not make that 30-day notice requirement. Now whether he could have provided that information, even before I had set it for trial, is what Mr. Mack is arguing, and because of the fact that this has been presumed that it was going, and it has looked like it was going to trial, the defendant has wanted it to go to trial, and everybody has anticipated that it is going to go to trial, is meaningful argument but I do not think it is reasonable to say that it was not even bound over and any appearance before me and set for any trial date. I am not finding that their failure to comply was disingenuous because they really had to give what information they can and simply did not meet the technical requirement of the 30-day notice because the trial was set sooner than 30 days.

They said they gave the information as quick as they could and even then the remedy for that is not to keep out the evidence but the remedy for that is a continuance. And I asked the defendant at that time, given the fact that we had two conflicting issues for a delay, as whether he wanted the time to have that expert testimony information, or if he wanted to stay the 120-day time period. And Mr. Mack talked with his office, discussed it with Mr. Houston, looked into the issues and determined that they did in fact need the time to correlate and adequately prepare.

Again, that is not unreasonable and, again, it was not something that I am therefore saying that the delay was on the part of the defendant. I am simply looking at all of the circumstances and finding that under those facts, without stating that the delay was specifically to the defendant, or specifically to the State, that under all of those facts it was reasonable to give everyone time they needed to meet the statutory requirements of expert notice, and that the delay was not unreasonable to reset this trial. The resetting was done as quickly as we could.

A number of days were discussed and this was the first day that we could get all parties here, so the April 24th date, which is scheduled this week and which is apparently going forward, is a reasonable date as the court calendar and every other circumstance could be taken into consideration, if I find that it was not unreasonable to delay it because of the expert witness issue and the conflict counsel issue. I find both of those reasons good for delay, so I am denying Mr. Houston's Motion to Dismiss because it was not held within the 120 days.

That brings us then - -

MR. BURMESTER: May I approach, Your Honor?

THE COURT: Yes.

MR. BURMESTER: I will just give this to counsel now. He has already received a copy. This is a proposed copy of Findings of Fact, and Conclusions of Law on the issue, and that is a courtesy copy to the Court. And, of course, it needs to go through counsel before the original can come. I will just give that to you in case if the Court has some problems with it.

THE COURT: I appreciate that. I am asking to have the State prepare the proposed Findings of Fact, and Conclusions of Law on this with these